

Transmitted via Email

March 24, 2017

Anne Littlejohn
Central Valley Regional Water Quality Control Board
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Re: Amendment to the Water Quality Control Plans for the Sacramento River and San Joaquin River Basins and the Tulare Lake Basin to Incorporate a Process into the Basin Plans for Determining Appropriate Designation and Level of Protection of Municipal and Domestic Supply (MUN) in Agriculturally Dominated Water Bodies

Dear Ms. Littlejohn,

I am writing on behalf of San Francisco Baykeeper, California Sportfishing Protection Alliance, Pesticide Action Network – North America, and Environmental Justice Coalition for Water. We are greatly concerned about the proposal to amend the Water Quality Control Plans for the Sacramento River and San Joaquin River Basins and the Tulare Lake Basin (“Basin Plans”) to incorporate a process by which the designated use of Municipal and Domestic Supply (MUN) could be removed from agriculturally (“Ag”) dominated water bodies. These proposed Basin Plan Amendments, as written, would likely result in significant degradation of the already-impaired surface waters in the Central Valley, substantially harm users near these waters, as well as downstream water users, and would exacerbate the impacts to downstream waters of the San Francisco Bay-Delta. Moreover, as written, this proposal violates the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (“Clean Water Act”), the Porter-Cologne Water Quality Control Act, Water Code § 13000 *et seq.* (“Porter-Cologne”), and other applicable laws and regulations.

I. The Source of Drinking Water Policy Does Not Allow Regional Boards to De-Designate Waters Already Designated as MUN.

The Source of Drinking Water Policy, State Water Resources Control Board Resolution No. 88-63 (“Drinking Water Policy”), states that all surface waters in the State should be designated as sources of drinking water, unless the waters fall into specific limited exceptions. The Drinking Water Policy applies to the initial designation: “[a]ll surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply **and should be so designated** by the Regional Boards with the exception of...” (emphasis added.) Under its plain language, the Drinking Water Policy sets forth affirmative requirements for **designation** of surface and ground waters as supporting the MUN beneficial use. It does not, however, set forth required conditions or elements for **de-designation** of the MUN beneficial use once the designation has been applied. Thus, once a water is designated as MUN, it cannot be de-designated even if it properly falls under an exception in the Drinking Water Policy.



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II. Even if the Exceptions to the Drinking Water Policy Apply, the Basin Plan Amendments Do Not Meet the Requirements of Exception 2b.

Even if the Drinking Water Policy allowed the Regional Board to de-designate a water as MUN if it falls into an exception, Exception 2b, which the Regional Board relies on, does not support the proposed Basin Plan Amendments. Exception 2b applies to: a surface water that “is in systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards.” The proposed Basin Plan Amendments do not meet this exception because (1) the waters which may be de-designated under the Basin Plan Amendments are far broader than the waters listed in Exception 2b, and (2) the Basin Plan Amendments do not ensure sufficient monitoring as required by Exception 2b.

A. The Basin Plan Amendments Improperly Apply Exception 2b to Ag Dominated Waters.

The Drinking Water Policy, if it allows for any de-designation at all, only allows for de-designation under Exception 2b of a very specific and limited type of water, specifically water that “is in a system designed or modified for the primary purpose of conveying or holding agricultural drainage water.” The Basin Plan Amendments improperly attempt to extend this limited exception to apply to what the Staff report refers to as Ag dominated waters, a much broader category of waters than under Exception 2b. The Staff Report states that waters that have been categorized as constructed and modified combinations of agricultural drainage and water supply (referred to as C1 and M1 designations) would be subject to de-designation. But nowhere has the Staff Report supplied a rationale as to why these waters fit the very limited category of waters in Exception 2b. Exception 2b applies to agricultural drains that were constructed to hold agricultural discharges, not any water receiving agricultural discharges, and certainly not waters that are used for water supply.

Moreover, because of the nature of the Central Valley, many, if not all, of the surface waters could be designated as Ag dominated waterbodies. This proposal defies the purpose of the Drinking Water Policy, which was to protect State waters, with very few exceptions, for drinking water purposes. The Regional Board must revise its definition of Ag dominated waterbodies to comply with the Drinking Water Policy.

B. The Basin Plan Amendments Do Not Fall Under Exception 2b Because They Do Not Require Monitoring to Assure Compliance with Downstream Water Quality Objectives.

Exception 2b of the Drinking Water Policy also requires that “the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards.” The Surveillance and Monitoring Chapter of the Staff Report does not provide the monitoring required under Exception 2b.

The Surveillance and Monitoring Chapter does not propose specific monitoring that is sufficient to meet the requirements of Exception 2b, rather it proposes to rely on monitoring required under existing programs and regulations, such as monitoring required under NPDES permits or

waste discharge requirements (“WDRs”). These programs will not be sufficient to assure compliance with all downstream water quality objectives (“WQOs”). For example, the State Water Resources Control Board (“State Board”), as well as many other interested parties, have criticized the monitoring in the Regional Board’s irrigated lands regulatory program, which are incorporated into WDRs, as being insufficient. Thus, without changes, current regulatory schemes cannot be relied upon for monitoring to meet the requirements of Exception 2b.

The Staff Report acknowledges that Exception 2b requires monitoring sufficient to show compliance with all downstream WQOs, including MUN. Draft Staff Report at 66. Yet, currently the monitoring requirements under WDRs for agricultural discharges, for the most part, do not require monitoring for drinking water contaminants. Moreover, even if the current WDRs do require monitoring for drinking water contaminants, if the receiving waters are no longer designated for MUN, then the requirement to monitor for those contaminants may be removed. The proposal does not appear to prohibit this result. The Regional Board must require dischargers to monitor for drinking water contaminants in order to determine if their discharges impact downstream WQOs intended to protect MUN.

III. The Staff Report Fails to Show how the Proposal Meets the Requirements of the Antidegradation Policy

The Staff Report acknowledges that the antidegradation policy applies to the waters affected by the proposed Basin Plan Amendments, yet it fails to adequately describe how the Basin Plan Amendments meet the requirements of the antidegradation policy. The Staff Report states that this proposal complies with the antidegradation policy because agriculture has been occurring in the Central Valley for over a century. Thus, by implication, agricultural discharges could not further degrade waters. This rationale ignores the fact that agricultural practices do change in ways that often impact receiving water quality. Changes in crop type, pesticide use, and water supply management can have dramatic effects. If agricultural dischargers are no longer concerned with meeting water quality objectives for MUN, this may increase changes that impact water quality. Yet the Staff Report improperly ignores this reality in making its determination. The Regional Board must revise its analysis to account for changing agricultural discharges.

IV. The LMUN Designation Violates the Drinking Water Policy, Is Unclear, and Fails to Protect Downstream Waters

The Basin Plan Amendments propose recognizing the LMUN designation. First and foremost, this designation, on its face, violates the Drinking Water Policy because it allows waters that do not meet specific exceptions under the Drinking Water Policy to remove their designation under MUN. For that reason alone, the LMUN designation is unlawful.

Second, it is unclear what uses this designation is attempting to protect and how implementing this designation will be implemented. What does it mean for a waterbody to have limited municipal use? The State Board is currently considering a variance policy that would allow some deviation to achieve beneficial uses. It appears that the LMUN standard may simply provide a variance from the MUN designation without the protections afforded by a formal variance (e.g., time limitation on variance, requirement to plan to achieve beneficial use in the future).

Third, the LMUN designation seems to remove all requirements to protect the MUN designation, even though it seems to recognize that MUN uses still, to a certain extent, exist in that waterbody. Moreover, it is unclear how this designation protects for downstream uses, in particular downstream waters that have a MUN designation.

V. The Proposed Basin Plan Amendments Improperly Delegate Discretionary Decisions and Basin Plan Amendments to Staff.

The Basin Plan Amendments allow Regional Board staff to determine whether the MUN designation should be removed for a specific waterbody. Under Porter Cologne and the Clean Water Act, designated uses are WQOs that must be approved by the Regional Board, State Board, and EPA. Water Code § 13245; 33 U.S.C. § 1313(c). The Regional Board cannot lawfully delegate the authority to establish designated uses to staff. Water Code § 13223.

The de-designations are only approved by the Regional Board in Step 3 of the Implementation Process after they are in effect and being implemented. Draft Staff Report at 61. Therefore, before the Regional Board adopts the de-designations formally into the Basin Plan, the de-designations may be used for all regulatory purposes, including permits. Labelling the staff decisions as “interim designations” cannot save this process. The de-designations are changes to water quality objectives and cannot be implemented until the Regional Board, State Board, and EPA have approved them.

VI. The Proposed Basin Plan Amendments Must Undergo Peer Review

The Regional Board has improperly determined that the Basin Plan Amendments do not need to undergo peer review, as required under California Health & Safety Code section 57004. The assumption is that Basin Plan amendments must undergo peer review because they are (or should be) based on scientific findings that “establish a regulatory level, standard, or other requirement for the protection of public health or the environment.” Health & Safety C. § 57004. The Regional Board has not sufficiently justified why the proposed Basin Plan Amendments, in contrast to all other basin plan amendments, would not undergo peer review. By implication the Regional Board is stating that it has not made any scientific findings on which to base its proposed amendments. Yet, clearly the Basin Plan Amendments involve, or should involve, findings based on scientific evidence.

For example, the monitoring and surveillance program proposed by this amendment must meet specific requirements to assure protection of water quality objectives, including downstream uses. Whether or not the monitoring proposed in this amendment sufficiently meets that standard is a scientific finding that must undergo peer review.

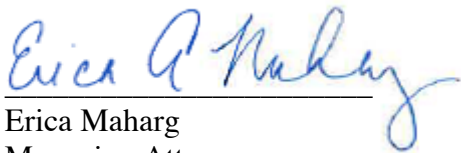
Moreover, de-designating waters to LMUN requires specific findings that the waterbodies have inherent limiting conditions that justify less-protective designations. Such a finding should be based on scientific evidence, yet this finding would be implemented absent peer review. As written, the Basin Plan Amendments would allow Regional Board staff to change the MUN designation to LMUN, and that designation could be implemented without Regional Board approval and without peer review, yet this action undoubtedly establishes a “regulatory level, standard, or other

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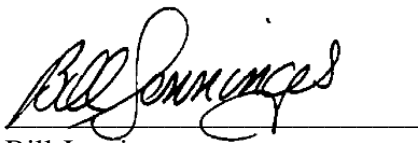
requirement for the protection of public health or the environment.” Health & Safety C. § 57004. Thus, approving this process without peer review would violate Health and Safety Code requirements.

For these reasons, the Basin Plan Amendments as proposed do not meet the requirements of the Clean Water Act, Porter Cologne, and the Drinking Water Policy and, thus, must be rejected. If you have any questions about these comments, please contact me at (510) 735-9700, x 106 or erica@baykeeper.org. Thank you for your consideration.

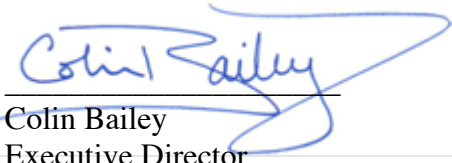
Sincerely,



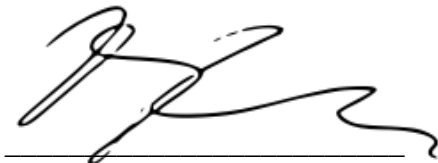
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